UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXETER FINANCE CORP. **and** **BRADLEY GOLDOWSKY, an Individual**	**CASE NO.: 03-CA-158382**

RESPONSE TO MOTION TO TRANSFER PROCEEDINGS TO THE BOARD FOR SUMMARY JUDGMENT AND ISSUANCE OF A DECISION AND ORDER

Exeter Finance Corp. ("Respondent") by and through undersigned counsel, pursuant to Sections 102.24 and 102.50 of the National Labor Relations Board's (the "Board") rules and regulations, hereby files its Response to the Counsel for the General Counsel's ("CGC") Motion to Transfer Proceedings to the Board for Summary Judgment and Issuance of a Decision and Order (the "Motion for Summary Judgment"). Respondent consents to the transfer of the proceedings to the Board pursuant to Section 102.50 of the Board's rules and regulations. However, the Board should deny summary judgment for the CGC and dismiss the Amended Complaint in its entirety for the following three (3) reasons: (i) the Board's decisions in *D.R. Horton,* 357 NLRB No. 184 (2012) and its progeny are wrongly decided and their reasoning rejected by a near unanimity of courts who have examined the issue; (ii) certain allegations in the Amended Complaint are time barred by Section 10(b) of the Act; and (iii) certain remedies sought by the CGC are inappropriate.

I. Statement of Relevant Facts

At all material times, Respondent has been a corporation that acquires retail sales contracts from automobile dealers located across the country. From December 2012 until September 2014, Respondent maintained an office and place of business in Cheektowaga, New

York. Respondent admits that at all material times it was an employer engaged in commerce within the meaning of the National Labor Relations Act (the "Act"). In the spring of 2014, Respondent instituted a program in which it agreed to arbitrate all legal dispute with its employees (and pay the costs unique to arbitration) in return for its employees' agreement to do the same, which was memorialized in the Mutual Arbitration Agreement ("MAA"), a copy of which is attached hereto as Exhibit A. The MAA stated, in relevant part:

> 1. Except as provided below, Employee and the Company[1] both agree all legal disputes and claims between them, including without limitation those relating to Employee's employment with the Company…shall be determined exclusively by final and binding arbitration before a single, neutral arbitrator as described herein. Except as provided in paragraph 2 below, claims subject to arbitration under this Agreement include those for…wages, overtime, benefits, or other compensation…. This Agreement does not in any way bar or restrict the right to file charges with the National Labor Relations Board.
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> 7. This Agreement prohibits the arbitrator from consolidating the claims of others into one proceeding, to the maximum extent permitted by law. This means that an arbitrator shall hear only individual claims and is prohibited from fashioning a proceeding as a class, collective, representative, or group action or awarding relief to a group of employees in one proceeding, to the maximum extent permitted by law.
>
> 11. Employee may opt-out of this Agreement by delivering, within 30 days of the date this Agreement is provided to Employee, a completed and signed Opt-Out Form to the Company's senior Human Resources officer at the Company's headquarters. An Opt-Out Form is available from the Human Resources office. If Employee does not deliver the form within 30 days, and if Employee accepts or continues employment with the Company after that date, Employee shall be deemed to have accepted the terms of this Agreement. (Exhibit A.)

Employees were given the option of opting out of the Mutual Arbitration Agreement by delivering, within 30 days of the date the Mutual Arbitration Agreement was presented to them, a signed copy of an opt-out form to Exeter's senior Human Resources officer. (*Id.*) The MAA provides that if an employee does not opt out of the MAA, he or she shall be deemed to have accepted its terms. (*Id.*)

[1] Defined in the MAA as Exeter Finance Corp.

On July 15, 2015, Bradley Goldowsky ("Goldowsky") filed a Complaint with the United States District Court for the Western District of New York in Case No. 1:15-cv-00632 alleging that Respondent violated the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL") by failing to pay Goldowsky at the proper overtime rate for hours worked over 40 in a week. In addition, Goldowsky brought the action as a putative collective action under the FLSA and putative class action under Fed. R. Civ. P. 23 and the NYLL. On August 11, 2015, Respondent filed its Motion to Compel Arbitration and Stay this Action (the "Motion to Compel") seeking to compel the claims of Goldowsky to arbitration pursuant to the MAA and stay the case, or, in the alternative, compel the claims of Goldowsky and 20 FLSA opt-ins to arbitration pursuant to the MAA. Goldowsky has yet to respond to the Motion to Compel, and the Motion to Compel is currently pending before Judge Arcara in the Western District of New York.

II. Argument

A. Respondent Agrees that Transfer to the Board is Appropriate

Respondent agrees with CGC that transfer to the Board pursuant to Section 102.50 of the Board's rules and regulations is appropriate in this case. There is no genuine issue of material fact in this case that warrants a hearing. Respondent admits that beginning in the spring of 2014, it promulgated and maintained the MAA, which bound Respondent and those employees who did not opt out of the MAA to arbitrate all legal disputes between them. The MAA speaks for itself, and the sole issue in this case is purely a legal one – whether the MAA violates Section 8(a)(1) of the Act. As such, the Board should rule on this legal issue directly without the need for a fact-finding hearing before an ALJ. *See* 29 C.F.R. § 102.35(a) ("It shall be the duty of the administrative law judge to inquire fully into the facts as to whether the respondent has engaged

in or is engaging in an unfair labor practice…as set forth in the complaint or amended complaint.")

B. The Board's Decisions in *D.R. Horton* and Its Progeny Are Wrongly Decided and Should Not Be Followed

In *D.R. Horton*, the Board held that an employer violates Section 8(a)(1) of the Act when it requires employees, as a condition of their employment, to sign an agreement precluding them from proceeding as a class to address their wages, hours or other working conditions in a judicial or arbitral forum. *D.R. Horton*, 357 NLRB No. 184, slip op. at 1 (2012) *enf. den. in relevant part* 737 F.3d 344 (5th Cir. 2013). The Board has subsequently reaffirmed and expanded its doctrine on this issue. In *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 2 (2014) *enf. den. in relevant part* 2015 WL 6457613 (5th Cir. Oct. 26, 2015), the Board

> reaffirmed the *D.R. Horton* rationale, [and] appl[ied] it here to find that the Respondent has violated Section 8(a)(1) of the Act by requiring its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements in Federal district court when the Charging Party and three other employees filed a collective claim against the Respondent under the Fair Labor Standards Act.

In *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189 (2015), the Board found that an employer requiring employees to sign agreements mandating individual arbitration violated the Act, even where the employees could affirmatively opt out of the agreement by following a procedure set forth in the arbitration agreement. The Board subsequently reaffirmed this holding in *Amex Card Services Company*, 363 NLRB No. 40 (2015) and *Price-Simms, Inc.*, 363 NLRB No. 52 (2015).

However, such decisions are wrongly decided and should not be followed. Federal courts are in ***near unanimity*** that the Board's *D.R. Horton* doctrine is wrongly decided. This includes

every Circuit Court that has examined the issue – the Fifth, Eighth, Ninth, and Eleventh Circuits, as well as the Second Circuit, where this case arises. *See Raniere v. Citigroup Inc.*, 533 Fed. App'x 11 (2d Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); *Murphy Oil USA, Inc. v. NLRB*, 2015 WL 6457613 (5th Cir. Oct. 26, 2015); *Owen v. Bristol Care*, 702 F.3d 1050 (8th Cir. 2013); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014).

In denying enforcement to the Board's original decision in *D.R. Horton*, the Fifth Circuit rejected the central arguments relied upon by the Board in that case and the subsequent Board decisions on the issue, and by the CGC in its Motion for Summary Judgment.[2] The Fifth Circuit first held, relying on Supreme Court precedent in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that the "use of class action procedures…is not a substantive right." *D.R. Horton*, 737 F.3d at 357. The Fifth Circuit next rejected the Board's argument that its decision and reasoning were compatible with the Federal Arbitration Act ("FAA") and recent Supreme Court precedent in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) because, contrary to the Board's claims, "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA." *Id.* at 360. Lastly, the Fifth Circuit rejected the notion that the Act – and employees' Section 7 rights – overrides the FAA, and held that the Act "should not be understood to contain a congressional command overriding application of the FAA." *Id.* at 362. Thus, for these reasons, which have been followed by every Circuit Court to examine the issue, it

[2] The Fifth Circuit did enforce the Board's finding that the employer violated the Act because the arbitration agreement included "language that would lead employees to a reasonable belief that they were prohibited from filing unfair labor practice charges." *D.R Horton*, 737 F. 3d at 363. In the instant case, the CGC does not argue that the MAA violates the Act on this basis, and the MAA clearly states that it "does not in any way bar or restrict the right to file charges with the National Labor Relations Board." (Exhibit A.)

is clear that the Board has overstepped its authority on this issue, and should decline to continue to follow its *D.R. Horton* decision and the decision's progeny.

Moreover, Respondent notes that even if the Board should follow the reasoning set forth in *D.R. Horton* and *Murphy Oil*, the Board should decline to follow its decision in *On Assignment Staffing Services, Inc.*,[3] 362 NLRB No. 189, which held that agreements requiring arbitration of individual claims but containing opt-out provisions are still unlawful. The Board's reasoning is faulty, as the MAA's opt-out provision, and other similar opt-out provisions, do not create a mandatory condition of employment, and the requirement that employees act to affirmatively opt out of the MAA does not interfere with those employees' Section 7 rights.

C. Certain Allegations in the Amended Complaint are Time Barred by Section 10(b) of the Act

The Amended Complaint alleges, among other things, that Respondent has violated the Act by requiring employees, including Goldowsky, to sign the MAA. (Amended Complaint ¶ 5.) However, Goldowsky acknowledged on March 10, 2014 that he agreed to the terms of the MAA,[4] which is more than six months prior to the filing of the Charge in this case on August 20, 2015. As such, the allegation in the Amended Complaint that Respondent violated the Act by requiring Goldowsky to sign, or acknowledge, the MAA should be dismissed as being time barred pursuant to Section 10(b) of the Act. *See Price-Simms, Inc.*, 363 NLRB No. 52, slip op.

[3] And subsequent decisions in *Amex Card Services Company*, 363 NLRB No. 40 (2015) and *Price-Simms, Inc.*, 363 NLRB No. 52 (2015).

[4] Although the Amended Complaint alleges that Goldowsky signed the MAA, the MAA was acknowledged electronically, not physically signed. Respondent does not maintain that the difference creates a genuine dispute of material fact.

at 2 (finding allegation that employer promulgated unlawful arbitration policy more than six months before the charge was filed to be time barred by Section 10(b) of the Act).[5]

D. Certain Remedies Sought by the CGC are Inappropriate

In its Motion for Summary Judgment, the CGC seeks reimbursement by Respondent to Goldowsky for any litigation expenses directly related to opposing the Motion to Compel. However, Goldowsky has not opposed Respondent's Motion to Compel, which is currently pending before the Western District of New York, and Goldowsky's time to do so has long passed. As such, reimbursement to Goldowsky of any litigation expenses would be an inappropriate remedy under the circumstances.

III. Conclusion

For all these reasons the Board should accept transfer of the case, deny the CGC's Motion for Summary Judgment, and dismiss the case in its entirety.

New York, New York
January 20, 2016

Respectfully Submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

/s Frank Birchfield

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[5] In addition, the employees listed in Addendum A, attached to the Charge filed in this case, all acknowledged their MAA in March or April of 2014. As such, any allegation in the Amended Complaint that Respondent violated the Act as to the Addendum A employees (or any other employees who acknowledged their MAA prior to February 20, 2015) by requiring them to sign, or acknowledge, the MAA should be dismissed as being time barred under the Act.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 20, 2016, the aforesaid Response to Motion to Transfer Proceedings to the Board for Summary Judgment and Issuance of a Decision and Order was electronically filed using the NLRB E-Filing system, and copies were sent via electronic mail to Eric Duryea, Counsel for the General Counsel (eric.duryea@nlrb.gov), and Michael J. Lingle, counsel for the Charging Party (mlingle@theemploymentattorneys.com).

/s Frank Birchfield
Frank Birchfield